U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 03 August 2007

In the Matter of
M. M. W., Widow of J. G. W. [1]
Claimant

Case No. 2007-BLA-05136

v.

N.O.W. COAL CO.
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

APPEARANCES:
Joseph Wolfe, Esq. and Andrew Delph, Esq.[2]
For the Claimant

Lucy Bowman, Esq.
For the Employer

Mary Forrest-Doyle, Esq.[3]
For the Director

BEFORE: DANIEL F. SOLOMON
Administrative Law Judge

DECISION AND ORDER

CLOSED PERIOD OF BENEFITS

This matter arises from a claim for survivor's benefits under the Black Lung Benefits Act, Title 30, United States Code, Sections 901 to 945 ("the Act"), as implemented by 20 C.F.R. Parts 718 and 725. Benefits are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis, or to survivors of persons who die due to pneumoconiosis.

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[1] Effective August 1, 2006, the Department of Labor instituted a policy that decisions and orders in cases under the Black Lung Benefits Act which will be available on this Office's website shall not contain the claimant's name. Instead, the claimant's initials will be used.

[2] Mr. Delph participated in an April 9, 2007 conference call.

[3] Did not appear at hearing or participate in the July 17, 2007 Conference Call.

Pneumoconiosis is a dust disease of the lung arising from coal mine employment and is commonly known as "black lung" disease.

PROCEDURAL HISTORY

The miner was born September 9, 1941 and died on December 14, 2003. (Director's Exhibit "DX" 2, DX 7).[4] The survivor's claim for benefits was filed on February 5, 2004 (DX-2). A Notice of Initial Finding was issued on July 9, 1993 concluding that, absent additional evidence, the miner was not entitled to Black Lung benefits. (DX 28). The Claimant requested "modification" and submitted additional evidence, the reports of Dr. Joshua Perper. DX 32, DX 35. On April 11, 2006, the District Director entered a Proposed Decision and Order granting modification and awarding benefits. DX 39.

After the claim was assigned to this Office, Employer filed a Motion to Remand. Mr. Delph and Ms. Forest-Doyle participated in an April 9, 2007 conference. The Motion was based on Employer's objection to the Director's consideration of "evidence not of record," the Director's "failure to explain his conclusion regarding entitlement," and the Director's alleged favor of Claimant. Employer maintains that Director allowed claimant a couple months to develop evidence without allowing the operator the same opportunity. After having been fully advised, I denied the Motion, on the basis that I would hold a *de novo* hearing under the Administrative Procedure Act and the Regulations and would give all sides an opportunity to cure any defects that may have existed below.

On April 25, the parties appeared for hearing at Big Stone Gap, Virginia. The Claimant appeared by counsel, and waived an oral hearing. The Director was not represented. See Transcript, at 3. Telephone conferences were held on May 31 and July 17. At that time, I admitted 56 Director's exhibits, DX 1- DX 56, and six Employer's exhibits, "EX 1- EX 6. See Transcript of that conference "TR" at pages 6 and 7. I also admitted the Claimant's deposition as ALJ-1. TR 8.

In ALJ-1, Claimant testified that she remarried her first husband on July 22, 2005. ALJ 1 at 5. She has worked full time as a bookkeeper for thirty years, the last several years for R.S. Jones and Boring Contractors, Inc. in Abingdon, Virginia. Id. at 7-8.

Claimant indicated the miner worked at N.O.W. Coal as a supervisor and quit in 1993 due to a back injury. Id. at 9. He never returned to gainful employment. Id. at 10. The Miner was diagnosed with Lou Gehrig's Disease in June or July of 2002, and he reported to the Mayo Clinic for a second opinion on the advice of Dr. James Brasfield. Id. at 11. Doctors confirmed the diagnosis, and after that was treated by Dr. Doug Williams, Bristol Virginia, approximately once per month from the time of his diagnosis until his death. Id. at 13. Claimant indicated that Dr. Williams and physicians from the ALS Clinic at the University of Virginia monitored the condition. Id. at 13-14.

Although the Claimant had offered an x-ray at one time, on the record, she chose not to use it. TR 8. The Claimant did not offer any spirometry or blood gas studies. TR 10-11.[5] The Employer also did not offer any x-ray evidence, spirometry or blood gasses results for evaluation. The Claimant and Employer filed closing statements.

[4] "CX" refers to Claimant's Exhibit and "EX" refers to Employer's exhibit. "ALJ" refers to the deposition transcript that was marked and entered at the telephone conference July 17, 2007.

[5] Records from J.R. Forehand M.D. are mentioned but were not identified for evaluation by the parties.

APPLICABLE STANDARDS

Because the Claimant filed this application for benefits after March 31, 1980, the regulations set forth at part 718 apply. This claim is governed by the law of the United States Court of Appeals for the Fourth Circuit, because the Claimant was last employed in the coal industry in the Commonwealth of Virginia within the territorial jurisdiction of that court. ***Shupe v. Director*, OWCP**, 12 B.L.R. 1-200 (1989) (en banc).

This case represents a survivor's claim for benefits. In order to receive benefits, the claimant must prove: (1) that the miner had pneumoconiosis, (2) the miner's pneumoconiosis arose out of coal mine employment, and (3) the miner's death was due to pneumoconiosis. 20 C.F.R. § 718.205(a). A miner's death was due to pneumoconiosis if: (1) competent medical evidence establishes that the miner's death was due to pneumoconiosis, (2) pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or the death was caused by complications of pneumoconiosis, or (3) the presumption for complicated pneumoconiosis at § 718.304 is applicable. 20 C.F.R § 718.205(c)(1) – (3). However, survivors are not eligible for benefits where the miner's death was caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death. 20 C.F.R. § 718.205(c)(4).

A "substantially contributing cause" is any condition that hastens the miner's death. 20 C.F.R. § 718.205(c)(5). Any condition that hastens the miner's death is a substantially contributing cause of death for purposes of § 718.205. In a survivor's claim under Part 718, the claimant must demonstrate that pneumoconiosis "hastened" the miner's death "in any way.", ***Richardson v. Director, OWCP***, 94 F.3d 164 (4th Cir. 1996);***Shuff v. Cedar Coal Co***., 967 F.2d 977 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 969 (1993).

ISSUES

1. Whether the person upon whose death or disability the claim is based is a miner.
2. The length of coal mine employment.
3. Whether the miner had pneumoconiosis.
4. If so, whether pneumoconiosis arose out of coal mine employment.
5. Whether the miner's death was due to pneumoconiosis.
6. Whether Employer is the Responsible Operator and has secured the payment of benefits.
7. Whether the Claimant is an eligible survivor.

BURDEN OF PROOF

"Burden of proof," as used in this setting and under the Administrative Procedure Act[6] is that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." "Burden of proof" means burden of persuasion, not merely burden of production. 5 U.S.C. § 556(d).[7] The drafters of the APA used the term "burden of proof" to mean the burden

[6] 33 U.S.C. § 919(d) ("[N]otwithstanding any other provisions of this chapter, ant hearing held under this chapter shall be conducted in accordance with [the APA]; 5 U.S.C. § 554(c)(2). Longshore and Harbors Workers' Compensation Act ("LHWCA") 33 U.S.C. § 901-950, is incorporated by reference into Part C of the Black Lung Act pursuant to 30 U.S.C. § 932(a).

[7] The Tenth and Eleventh Circuits held that the burden of persuasion is greater than the burden of production, ***Alabama By-Products Corp. v. Killingsworth***, 733 F.2d 1511, 6 B.L.R. 2-59 (11th Cir. 1984); ***Kaiser Steel Corp.***

of persuasion. ***Director, OWCP, Department of labor v. Greenwich Collieries [Ondecko]***, 512 U.S. 267, 18 B.L.R. 2A-1 (1994).[8]

A Claimant has the general burden of establishing entitlement and the initial burden of going forward with the evidence. The obligation is to persuade the trier of fact of the truth of a proposition, not simply the burden of production; the obligation to come forward with evidence to support a claim. Therefore, the Claimant cannot rely on the Director to gather evidence. The Claimant bears the risk of non-persuasion if the evidence is found insufficient to establish a crucial element. ***Oggero v. Director, OWCP***, 7 B.L.R. 1-860 (1985).

MINER

20 C.F.R. §725.202(a) defines "miner" as the following:

> (a) Miner defined. A 'miner' for the purposes of this part is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. There shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner. This presumption may be rebutted by proof that:
>
> (1) The person was not engaged in the extraction, preparation, or transportation of coal while working at the mine site, or in maintenance or construction of the mine site; or
>
> (2) The individual was not regularly employed in or around a coal mine or coal preparation facility.

The Claimant testified that the Miner worked at N.O.W. Coal as a supervisor and quit in 1993 due to a back injury. Id. at 9. The record shows that the Miner stated to work in mining in 1958 and worked in mining to 1993. From 1988 to 1993, Miner was employed by the Employer. DX 3,DX 4. Over his career, the Claimant alleged that the Miner worked 33 years as a mine inspector, a coal loader, an electrician, a mechanic, and as a "utility man," all in underground mining. DX 3. There is no evidence that shows he was not a Miner.

The record reflects that the Claimant established that her former spouse was a miner and that he worked in post 1969 employment. The rebuttable presumption has not been met.

COAL MINE EMPLOYMENT

The claimant bears the burden of establishing the length of coal mine employment. ***Shelesky v. Director, OWCP***, 7 B.L.R. 1-34 (1984); ***Niccoli v. Director, OWCP***, 6 B.L.R. 1-910 (1984); ***Rennie v. U.S. Steel Corp***., 1 B.L.R. 1-859 (1978). I must make a specific, complete finding on this issue. ***Boyd v. Director, OWCP***, 11 B.L.R. 1-39 (1988).

The Director found 22 years of coal mine employment. A review of the Social Security records shows that the Miner did receive credit for working from 1958, to 1993, a 35 year period. However, the records show that there were times when the Claimant had minimum earnings and did not meet the quarter of coverage standard for Social Security purposes.

At a minimum, the record shows that the Claimant has established well over 20 years of coal mine employment. ***Dolzanie v. Director, OWCP***, 6 B.L.R. 1-865 (1984). The Social Security records and the allegations show that the Miner was paid for coal mine employment continuously from 1978 to 1993. He also worked full years in 1968-1969. He also worked parts

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v. Director, OWCP [Sainz], 748 F.2d 1426, 7 B.L.R. 2-84 (10th Cir. 1984). These cases arose in the context where an interim presumption is triggered, and the burden of proof shifted from a Claimant to an employer/carrier.

[8] Also known as the risk of non-persuasion, *see* 9 J. Wigmore, Evidence § 2486 (J. Chadbourn rev. 1981).

of years for the period 1958-1965. No testimony or explanatory evidence has been offered for those periods. I note the Bureau of Labor Statistics, Exhibit 610 of the Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual.

In 1962-1965, the Claimant had partial years when he also worked in Texas and Florida. Applying the table, if they were full years, the Claimant would establish 24 years coal mine employment by necessary application.

There are several years of self employment, and for those years, although the Miner may have engaged in coal mine employment, they are not explained and therefore Claimant has not met her burden for those periods. However, I accept her testimony in large part.

A finding concerning the miner's length of coal mine employment may be based exclusively on the claimant's own testimony where it is uncontradicted and credible. ***Bizarri v. Consolidation Coal Co***. , 7 B.L.R. 1-343 (1984); ***Coval v. Pike Coal Co .***, 7 B.L.R. 1-272 (1984); ***Gilliam v. G & O Coal Co.*** , 7 B.L.R. 1-59 (1984). Similarly, where the Social Security earnings record is found to be incomplete, it is reasonable to credit the claimant's uncontradicted testimony in establishing length of coal mine employment. ***Niccoli v. Director, OWCP*** , 6 B.L.R. 1-910 (1984). However, an administrative law judge may credit Social Security records over the claimant's testimony, where the testimony is unreliable. ***Tackett v. Director, OWCP*** , 6 B.L.R. 1-839 (1984).

After a review of all the evidence, I find that Claimant did not establish 33 years, but did establish at least 22 years.

RESPONSIBLE OPERATOR

20 CFR § 725.491(a), defines "operator" as the following:

> [A]ny owner, lessee or other person who operates, controls, or supervises a coal mine or any independent contractor performing services or construction at such mine..., [c]ertain other employers, including those engaged in coal mine construction, maintenance and transportation, shall also be considered to be operators for purposes of this part. An independent contractor or self-employed miner, construction worker, coal preparation worker, or transportation worker may also be considered a coal mine operator for purposes of this part.

Claimant identified the Employer, N.O.W. in DX 2 and DX 3. N.O.W. is identified in the Social Security records. DX 4. These records show that Miner was employed from 1988 to 1993 with Employer. The Employer is identified in DX 2 and DX 3 as the last coal work Employer.

The Employer did not, under my Prehearing Order notify me that it opposed the Department of Labor finding on Responsible Operator.

Liability is assessed against the most recent operator which meets the requirements at 20 C.F.R. §725.492 and 725.493 and 20 C.F.R.§725.491-725.494.

After a review of all of the evidence, I find that Employer N.O.W. is the Responsible Operator.

MEDICAL EVIDENCE

The following is a summary of the evidence of record designated for consideration in this survivor's claim.

Death Certificate

Signed by Andrew Reinhart, M.D., DX 7, the date of death is listed as December 14, 2003. Cause of death is listed as ameliotropic lateral sclerosis. Hypertension was also noted.

Autopsy

Joseph Segen, M.D.

Dr. Segen performed an autopsy on December 15, 2003 at Buchanan General Hospital. A history of coal mining and smoking was noted. Slides of lungs revealed changes of coal workers' pneumoconiosis including dust macules surrounded by focal emphysema, interstitial, subpleural and perivascular deposition of anthracotic pigmentation accompanied by intimal hyperplasia of pulmonary vessels consistent with pulmonary hypertension. The lungs further demonstrate early patchy acute pneumonia in particular in the right upper lobe in a background of pulmonary edema, emphysema and marked congestion. The diagnosis was:

1. Moderate coal worker's pneumoconiosis
2. Acute early pneumonia
3. Pulmonary edema
4. Global congestion.

DX 8.

Medical Reports

Joshua Perper, M.D.

Dr. Perper issued two reports, but the Claimant submitted the second report, DX 35 as a replacement for the first, and I will use it as the operative report.[9]

Dr. Perper, board certified pathologist, reviewed the slides and found from gross and microscopic samples "clear" evidence of moderately severe simple coal workers' pneumoconiosis with associated macules, primarily micronodular, a few sparse macronodules, aggregates of mieronoduies and focal interstitial fibro-anthracosis with presence of birefringent silica crystals. He determined that although ALS (Amyotrophic Lateral Sclerosis), also known as Lou-Gehrig disease was the principal cause of death, "coal workers' pneumoconiosis, caused, contributed substantially to and hastened the death of [Miner], through each one of his complications separately and in aggregate." Those complications included:

a. Replacement of normally breathing lung tissue by fibro-anthracotic dysfunctional tissue interfering with diffusion of respiratory gases.

b. Chronic obstructive pulmonary disease (COPD) on the background of centrilobular emphysema.

c. Terminal bronchopneumonia (alongside with his ALS disease).

Erica Crouch, M.D.

Dr. Crouch, board certified anatomic pathologist, reviewed the autopsy slides and diagnosed simple coal worker's pneumoconiosis based upon the presence of a small number of coal dust macules characterized by deposits of irregular black to dark brown pigment and short needle like particles detected by polarization microscopy. EX 5. Dr. Crouch is an attending pathologist at Washington University Medical Center and a tenured professor of pathology and immunology at that institution. Id. She noted that coal dust related lesions accounted for less than five percent of the parenchyma examined and found no coal dust nodules or larger lesions in her examination of the autopsy slides. She also noted the presence of relatively mild emphysema, superimposed vascular congestion, and acute bronchopneumonia. She stated that dust related changes were quite mild, both in extent and severity, and were far too mild to have caused any

[9] Although Claimant inadvertently referred to the wrong exhibit number on several occasions, the interests of justice require that I evaluate the latest report.

clinically significant degree of respiratory impairment or disability. She concluded that the amount of coal worker's pneumoconiosis present could not have caused, contributed to, or otherwise hastened his death. While she agreed with Dr. Perper's diagnosis of coal worker's pneumoconiosis, she argues that nearly all literature cited in Dr. Perper's report and appendix is irrelevant to the current case.

Gregory Fino, M.D.

Dr. Fino, board certified in internal medicine and pulmonology, reviewed the medical records associated with this claim and outlined his conclusions in a report dated June 11, 2007. He noted that all three pathologists found the presence of coal workers' pneumoconiosis after reviewing the autopsy slides, but noted no evidence of clinical coal workers' pneumoconiosis in the medical records. Dr. Fino advised that amyotrophic lateral sclerosis is a progressive neurological disease whereby the nerves that supply the muscles disintegrate, causing the muscles to become weak and eventually stop moving. He explained that this process generally begins in muscles of the arms and legs, eventually progressing to muscles of the lungs including the diaphragm, the muscles in between the ribs and muscles in the upper chest near the neck. He noted that respiratory failure is a frequent cause of death in patients with ALS. He also explained that pneumonia was a frequent complication of ALS, and noted the pathologists' reference to pneumonia on autopsy. Dr. Fino concluded that the evidence of record indicated the miner died from complications of ALS, and found no evidence of a respiratory impairment related to any intrinsic lung disease, including coal worker's pneumoconiosis. EX 6.

Hospitalization Records and Treatment Notes

EX l 2/01/94 -9/25/03 *Emory H. Robinette M.D. Office Notes*
In a note dated May 20, 2003, Dr. Robinette took pulmonary function tests, and found a restrictive ventilatory defect, categorized as "moderate." This note was sent to Dr. Rhinehart. Condition: deteriorating from underlying ALS; patient counseled strongly about chronic cigarette smoking; moderate restrictive lung disease without response to bronchodilator therapy

EX 2 6/14/00-12/10/03 *Andrew Rhinehart Office Notes*
Diagnoses include deep vein thrombosis and left sided pulmonary edema, seizure disorder; mild anemia; chronic low back pain; depression; hypertension; hyperlipidemia; cholelithiasis; chronic left shoulder pain; s/post shoulder surgery 12/26/01; diagnosis of ALS by Mayo Clinic (08/13/02 treatment for pulmonary embolism of left lung; DVT.

EX 3 12/17/93 - 8/10/00 *Johnston Memorial Hospital*
Seizure disorder; depression; chronic low back pain; hyperlipidemia; history of cholelithiasis; status post right rotator cuff surgery; hypertension; anemia; degenerative joint disease; 40 pack year history of smoking, 30 year history of underground coal mine employment, disabled due to back injury and back pain

EX 4 3/31/03—10/13/03 Douglas P. Williams M.D. Office Notes
Amyotrophic lateral sclerosis; pulmonary embolism, deep vein thrombosis; asthma; seizure disorder; sp right rotator cuff surgery; degenerative joint pain; depression.

Existence of Pneumoconiosis

In a survivor's claim filed after January 1, 1982, claimant must establish the existence of pneumoconiosis, when the existence of pneumoconiosis is an issue, under any of the methods available at Section 718.202(a)(1)-(4) before establishing death due to pneumoconiosis at 20 C.F.R. §718.205(c). ***Trumbo v. Reading Anthracite Co.***, 17 BLR 1-85 (1993). The presence of pneumoconiosis arising from coal mine employment was established in the living miner's claim. In the instant survivor's claim, the Employer has not stipulated to the presence of pneumoconiosis. This case arises within the territorial jurisdiction of the Fourth Circuit. Thus, absent contrary evidence, while evidence relevant to any of the above categories may demonstrate the existence of pneumoconiosis, the adjudicator, in the final analysis, must weigh all of the evidence together in reaching a finding as to whether a miner has established that he has pneumoconiosis. ***Island Creek Coal Co. v. Compton***, 211 F.3d 203, 211, 22 B.L.R. 2-162 (4th Cir.2000).

A living miner can demonstrate the presence of pneumoconiosis by: (1) chest x-rays interpreted as positive for the disease (§ 718.202(a)(1)); or (2) biopsy report (§ 718.202(a)(2)); or the presumptions described in Sections 718.304, 718.305, or 718.306, if found to be applicable; or (4) a reasoned medical opinion which concluded the disease is present, if the opinion is based on objective medical evidence such as blood-gas studies, pulmonary function tests, physical examinations, and medical and work histories. (§ 718.202(a)(4)).

X-ray Evidence

The parties have offered no x-ray evidence.

Biopsy and Presumption

Claimant has provided the pathology reports by autopsy of Dr. Segen showing "moderate" deposits generating pneumoconiosis and a report by Dr. Perper. The Employer provides the report of Drs. Crouch and Dr. Fino. All acknowledge the existence of simple pneumoconiosis.

Medical Reports

20 C.F.R. § 718.202(a)(4) sets forth:

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in Section 718.201. Any such finding shall be based on objective medical evidence such as blood-gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

The Claimant offers medical reports by Drs. Segen and Perper, who diagnose coal workers' pneumoconiosis. The Employer relies on the reports of Drs. Crouch and Fino who do also, although Dr. Fino qualified his diagnosis as he stated that he could not find evidence of clinical pneumoconiosis.

The Employer directs me to the treatment records, as office notes from Dr. Rhinehart spanning the period of June, 2000 to December, 2003 document that a myriad of medical conditions, including deep vein thrombosis and left sided pulmonary edema, seizure disorder, mild anemia, chronic low back pain, depression, hypertension, hyperlipidemia, cholelithiasis, chronic left shoulder pain are of record.

After a review of all of the evidence, I note that the Claimant failed to present x-ray evidence of pneumoconiosis. However, the autopsy/biopsy/pathology is conclusive that the Miner had simple pneumoconiosis, and the medical reports also outweigh the x-ray evidence.

CAUSATION

Once it is determined that the miner suffers (or suffered) from pneumoconiosis, it must be determined whether the miner's pneumoconiosis arose, at least in part, out of coal mine employment. 20 C.F.R. §718.203(a).

If a miner who is suffering from pneumoconiosis was employed for ten years or more in one or more coal mines, there is a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 C.F.R. §718.203(b). This provision applies to clinical pneumoconiosis.

Although the Claimant did not submit any x-ray evidence, usually the predicate to a finding of clinical evidence, I find that the autopsy evidence, combined with the medical history, produces a finding of clinical pneumoconiosis.

I note that Dr. Fino does not find clinical pneumoconiosis. If he does not accept that diagnosis, and does accept the pathology evidence is conclusive, then he must find "legal" pneumoconiosis.

"Legal pneumonoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment, and includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 CFR § 718.201(a)(2). **Barber v. Director, OWCP**, 43 F.3d 899 (4th Cir. 1995); ***Dehue v. Director, OWCP***, 65 F.3d 1189 (4th Cir. 1995); ***Hobbs v. Clinchfield Coal Co.,*** 45 F.3d 819 (4th Cir. 1995) ("a medical diagnosis of no pneumoconiosis is not equivalent to a legal finding of no pneumoconiosis").

I find that as the Miner had at least 22 years of coal mine employment and as he had symptoms consistent with pneumoconiosis and as Dr. Fino does not dispute a causal connection between work exposure and the diagnosis of pneumoconiosis, causation is proved. I note that although some of the medical opinion evidence is predicated on a more than 30 year work exposure, and I find 22 years, I find that this discrepancy is not material.Competent evidence establishes that his pneumoconiosis is significantly related to or substantially aggravated by the dust exposure of his coal mine employment. ***Shoup v. Director, OWCP***, 11 B.L.R. 1-110, 1-112 (1987). 20 C.F.R. §718.203(b) and (c).

DEATH DUE TO PNEUMOCONIOSIS

20 CFR § 718.205 provides that benefits are available to eligible survivors of a miner whose death was due to pneumoconiosis. An eligible survivor will be entitled to benefits if any of the following criteria are met:

1. Where competent medical evidence establishes that the miner's death was due to pneumoconiosis;
2. Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, or where death was caused by complications of pneumoconiosis; or
3. Where the presumption set forth in §718.304 (evidence of complicated pneumoconiosis) is applicable. 20 C.F.R. § 718.205(c). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5).

The circuit courts developed the "hastening death" standard, which requires establishment of a lesser causal nexus between pneumoconiosis and the miner's death. Complicated pneumoconiosis is not applicable in this case, therefore, the presumption set forth in § 718.304 in not applicable. Any condition that hastens the miner's death is a substantially contributing cause of death for purposes of §718.205. ***Shuff v. Cedar Coal Co.***, 967 F.2d 977 (4th Cir. 1992), cert. denied, 113 S. Ct. 969 (1993).

The issue; therefore, is whether the miner's death was hastened, to "any degree," by pneumoconiosis.

It is true, as the evidence indicates that Dr. Rheinhart was the miner's treating physician, that the treating physician's opinion merits consideration. He does not mention pneumoconiosis. Moreover, when he issued the Death Certificate and did not list it as a cause of death. However, a physician's conclusory statement on a death certificate, without further elaboration, is insufficient to meet Claimant's burden as to the cause of death. ***Bill Branch Coal Corp. v. Sparks***, 213 F.3d 186, 192 (4th Cir. 2000). Therefore, it should also not be dispositive as an alternate cause of death. The treating physician may be required to provide more than a conclusory statement before finding that pneumoconiosis contributed to the miner's death. It should be noted that a death certificate, in and of itself, is an unreliable report of the miner's condition and it is error to accept conclusions contained in such a certificate where the record provides no identification that the individual signing the death certificate possessed any relevant qualifications or personal knowledge of the miner from which to assess the cause of death. ***Smith v. Camco Mining, Inc.***,13 B.L.R. 1-17 (1989); ***Addison v. Director, OWCP***, 11 B.L.R. 1-68 (1988).

I also note that Dr. Rheinhart is not as well qualified to evaluate the post mortem evidence as are Drs. Perper and Crouch, both board certified in pathology. I assume that Dr. Segen is a pathologist, but his qualifications are not of record.

Dr. Perper noted a history of respiratory symptoms consistent with coal workers' pneumoconiosis. including exertional shortness of breath, cough, expectoration of mucus, wheezing, and orthopnea in the absence of cardiac symptoms and/or congestive heart failure. Part of that is due to cigarette smoking. He determined that there was a combination of factors involved in the Miner's demise, including "complications separately and in aggregate." Those complications included:

a. Replacement of normally breathing lung tissue by fibro-anthracotic dysfunctional tissue interfering with diffusion of respiratory gases.

b. Chronic obstructive pulmonary disease (COPD) on the background of centrilobular emphysema.

c. Terminal bronchopneumonia (alongside with his ALS disease).

Dr. Crouch also finds simple pneumoconiosis but she determined that coal dust related lesions accounted for less than five percent of the parenchyma examined and found no coal dust nodules or larger lesions in her examination of the autopsy slides. She also noted the presence of relatively mild emphysema, superimposed vascular congestion, and acute bronchopneumonia. She stated that dust related changes were quite mild, "far too mild" to have caused any clinically significant degree of respiratory impairment or disability.

First, the Claimant does not need to have to prove a "degree of respiratory impairment or disability" to prevail. The Department of Labor when promulgating the "hastening" regulation at 20 C.F.R. §718.205(c)(5), noted that persons weakened by pneumoconiosis "may expire quicker

from other diseases," see 65 Fed.Reg. 79,920, 79,950 (Dec. 20, 2000).[10]

Second, whereas Dr. Segen noted dust macules surrounded by focal emphysema, and anthracotic pigment accompanied by anthracotic pigmentation consistent with pulmonary hypertension, and described the deposits as "moderate," Dr. Crouch found:

> There is superimposed vascular congestion, edema, and very focal acute inflammation consistent with acute bronchopneumonia. The lungs also show small numbers of coal dust macules characterized by deposits of irregular black to dark brown pigment consistent with coal dust and short needle-like particles by polarization microscopy. A few of these lesions show focal emphysema. Sampling of lung tissue is quite extensive and coal dust-related lesions account for less than five percent of the examined parenchyma. No coal dust nodules or larger lesions are identified.

EX 5. From this description she determined that the pneumoconiosis is "mild."

Dr. Perper determined that the pneumoconiosis was "slight to moderate," but determined that the emphysema was "moderate."

A review of the case law shows that there is no baseline in the law to determine how much pneumoconiosis or how many and how large the legions must be to qualify. Pneumoconiosis can hasten death by significantly aggravating another disorder. ***Foreman v. Peabody Coal Co***., 8 B.L.R. 1-371, 1-374 (1985). I find that it is reasonable that there is enough "pneumoconiosis" and sequellae to consider it competent to produce hastening.

Third, Dr. Crouch fails to consider "legal" pneumoconiosis. Although she cites to the amount of coal dust she calculates as a total percentage of lung volume to determine that it is "too mild," the composition of coal dust may also include anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 CFR 718.201. The record shows the Miner was a smoker. In fact, even cigarette smoking can interplay with compensable pneumoconiosis. ***Consolidation Coal Co. v. Director, OWCP [Williams]***, 453 F.3d 609 (4th Cir. 2006). Asthma, asthmatic bronchitis, or emphysema may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure. ***Robinson v. Director, OWCP***, 3 B.L.R. 1-798.7 (1981); ***Tokarcik v. Consolidation Coal Co.***, 6 B.L.R. 1-666 (1983). In ***Hughes v. Clinchfield Coal Co.***, 21 B.L.R. 1-134, 1-139 (1999), the Board held that chronic bronchitis and emphysema fall within the definition of pneumoconiosis if they are related to the claimant's coal mine employment.

Moreover, Dr. Crouch noted silica, also. The silica can be considered as components of both clinical and legal pneumoconiosis.

Although she noted the presence of emphysema, superimposed vascular congestion, and acute bronchopneumonia, Dr. Crouch also failed to whether coal dust exposure aggravated the miner's emphysema or contributed to pneumonia or whether the emphysema hastened death.

Employer asks me to give elevated weight to Dr. Fino's opinions. Dr. Fino first noted that there was a "mild" respiratory impairment present, due to ALS. He did note that respiratory failure is a frequent cause of death in patients with ALS. He also explained that pneumonia was a frequent complication of ALS, and noted the pathologists' reference to pneumonia on autopsy. Dr. Fino concluded that the evidence of record indicated the miner died from complications of ALS, and found no evidence of a respiratory impairment related to any intrinsic lung disease, including coal worker's pneumoconiosis. He did review the entire record. I note that in a report dated May 20, 2003, Dr. Robinette took pulmonary function tests, and found a restrictive

[10] See ***Zeigler Coal Co. v. Director, OWCP*** [Villain], 312 F.3d 332 (7th Cir. 2002).

ventilatory defect, categorized as "moderate." Therefore I find that the opinion as to whether a respiratory defect was present is suspect.

Moreover, he is not as well qualified as Drs. Perper and Crouch to evaluate the pathology and he also did not discuss the effect of emphysema, documented by the autopsy, and by the reports of Dr. Perper and Dr. Crouch. He did not discuss how he reached his conclusion that there was no evidence of any respiratory disease, when in fact, he had commented on it elsewhere in his report. Treatment records show that the Miner was treated for respiratory diseases by Dr. Robinette (EX 1) and at Johnston Memorial Hospital (EX 1 and EX 3). He failed to account for Dr. Perper's position that there were complications imposed on the ALS "separately and in aggregate."

I attribute less weight to Dr. Fino's opinions because of the inconsistent findings, and the fact that he is less qualified than the pathologists as to cause of death.

Employer wants me to attribute less weight to Dr. Perper's opinions because he had erred in his first report, DX 32, and had to substitute DX 35 for it. The Employer was given an opportunity to rebut Dr. Perper's opinions and did submit its own reports. I do not apply impeachment of the second reports due to the defects of the first. See limitations on evidence, 20 CFR § 725.414.

The Employer also argues that I should discount Dr. Perper's opinions because the opinions offered by Drs. Crouch and Fino are supported by the opinions of the miner's treating physicians. As I said above, the issue in this case is "hastening," and Dr. Rheinhart and Dr. Williams were not asked to comment on hastening or whether there was any interplay between the Miner's ALS and his respiratory condition.

I note that Dr. Perper's reports cite to reports of Dr. J.R. Forehand that were not part of my record. In order to accept an opinion, I must determine the basis for it. After a review of the report, I find that Dr. Perper relied principally on the reading of the slides to render his opinion. He used Dr. Forehand's records for background, as well as those of Dr. Rheinhart and Segen. Therefore, I find that although the report may be tainted, the determination and logic is not flawed. Again, although I note that Dr. Perper also assumed that the Miner worked thirty five years in coal mine employment and I find 22 years, I find that this does not undermine his conclusions.

I find that Dr. Perper's logic is more rational than Dr. Crouch or Dr. Fino. ALS was the primary cause of death, but pneumoconiosis contributed to it. I note that even Dr. Fino noted a respiratory component to ALS[11] and it is reasonable that the presence of pneumoconiosis complicated the condition, as opined by Dr. Perper.

Moreover, the Claimant reminds me that Dr. Crouch is board certified only in anatomic pathology, while Dr. Perper is certified in anatomical, surgical and forensic pathology. (DX 35, EX 5). I find that Dr. Perper is well qualified to determine cause of death.

After a review of the record, I find that pneumoconiosis hastened the miner's death. 20 C.F.R. §718.205(c)(5) (2001). ***Richardson,*** *supra* and ***Shuff,*** *supra (*employing "hastening" standard).

SURVIVOR

If the claimant is an eligible survivor of a miner entitled to benefits under the Act, benefits may be paid beginning with the month of the miner's death. 20 C.F.R. §725.503(c)

[11] And, again, although it was not designated by Claimant, in his May 20, 2003 note, Dr. Robinette reported positive pulmonary function tests, and found a restrictive ventilatory defect, categorized as "moderate."

(2000) and (2001). 20 CFR § 725.212 provides entitlement to benefits where an individual is the surviving spouse or the surviving divorced spouse of a miner, if such individual:

(a) is not married;

(b) was dependent on the miner at the pertinent time; and

(c) the deceased miner either:

(i) was receiving benefits under Section 415 or Part C of Title IV of the Act at the time of death as a result of a claim filed prior to January 1, 1982; or

(ii) is determined as a result of a claim filed prior to January 1, 1982, to have been totally disabled due to pneumoconiosis at the time of death or to have died due to pneumoconiosis. A surviving spouse or surviving divorced spouse of a miner whose claim is filed on or after January 1, 1982, must establish that the deceased miner's death was due to pneumoconiosis in order to establish entitlement to benefits, except under §718.306 on a claim filed prior to June 30, 1982.

20 C.F.R. §725.212 (2000) and (2001).

A surviving spouse or surviving divorced spouse is entitled to benefits for each month beginning with the first month in which all the conditions for eligibility are satisfied. 20 C.F.R. §725.213(a) (2000) and (2001). The last month for which an individual is entitled to benefits is the month in which the surviving spouse or surviving divorced spouse either: (1) marries; (2) dies; or (3) qualified as the surviving spouse of a miner under §725.204(d), and subsequently ceased to qualify under that paragraph. 20 C.F.R. §725.213(b) (2000) and (2001).

The record reflects that the Claimant and Miner were married March 30, 1994. DX 6. The Claimant testified by deposition that she remarried July 22, 2005. TR 6.

I find that the Claimant was dependant on the Miner to the date of remarriage.

The Claimant became eligible due to proof of death due to pneumoconiosis in December 2003, as the Miner expired December 14, 2003. DX 7. The Claimant became ineligible for benefits July, 2005, the month when she remarried.

ATTORNEY'S FEES

Thirty days is hereby allowed to claimant's lawyers for the submission of an application for fees. A service sheet showing that service has been made upon all the parties, including claimant, must accompany the application. Parties have ten days following receipt of any such application within which to file any objections.

ORDER

It is **ORDERED** that a closed period of entitlement of the claim of **M. M. W., Widow of J. G.W**. is **GRANTED**. Benefits began in December, 2003 and ceased July, 2005.

A

DANIEL F. SOLOMON
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the decision is filed with the district

director's office. *See* 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481. If an appeal is not timely filed with the Board, the decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).